Case No. D48/06

Salaries tax – whether or not the nature of the sum of money is income from the employment – whether or not the nature of the sum of money is a compensation [Decision in Chinese].

Panel: Anthony Ho Yiu Wah (chairman), Clement Chan Kam Wing and Edward Cheung Wing Yui.

Date of hearing: 10 March 2006.
Date of decision: 29 September 2006.

In 1997, the employment of the taxpayer was transferred to Company D. In 2004, the taxpayer and Company B reached an agreement that once the taxpayer submitted the resign letter to Company D and began to work in Company B, Company B would give a sum of money to the taxpayer. Later the taxpayer submitted the resign letter and began to work in Company B. The taxpayer objected that the said sum of money received from Company B should not be subjected to salaries tax, because the said sum of money was not income from the employment and had nothing to do with Company B. Moreover the said sum of money was a compensation given to the taxpayer to compensate his loss for his leave from Company D and the said sum of money was received from Company B before the commencement of the employment in Company B.

Held:

1. The Board considers that the nature of the said sum of money was to induce the taxpayer to accept the offer of the employment of Company B. Besides, the time for the payment of the said sum of money and terms were all stated in the employment contract and was a part of the terms of the employment of the taxpayer by Company B.

2. After the change of the job, the new employment terms would replace the old employment terms. There did not exist any question of compensation. The new employer might be smaller in the size of business, so the risk on the change of the job would be higher. The offer of a sum of money was therefore required to attract the people to change their job. As a result the nature of the said money was not compensation, but was a term and a consideration for employment, which should be subjected to salaries tax (D36/92, IRBRD, vol 7, 366 considered).

3. The Board considers that the taxpayer received the said sum of money under the terms as provided in the employment contract. According to the terms, once the taxpayer commenced his employment, the taxpayer did not need to repay the said sum of money and the said sum of money would then become the income of the taxpayer which should be subjected to taxation (D83/00, IRBRD, vol 15, 726, Clayton v Gothorp 47 TC 168 considered).

Appeal dismissed.

Cases referred to:

D19/92, IRBRD, vol 7, 156
D36/92, IRBRD, vol 7, 366
D3/94, IRBRD, vol 9, 69
D4/05, IRBRD, vol 20, 256
D83/00, IRBRD, vol 15, 726
Clayton v Gothorp 47 TC 168

Samuel Lai S L and Yuen Wai Man of Messrs W M Yuen & Co, Certified Public Accountants, for the taxpayer.

(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS

Chan Siu Ying and Lau Yuen Yi for the Commissioner of Inland Revenue.

案件編號 D48/06

薪俸稅 – **款項性質是否受僱入息 – 款項性質是否賠償**

委員會：何耀華（主席）、陳錦榮及張永銳

聆訊日期：2006**年**3**月**10**日**
裁決日期：2006**年**9**月**29**日**

上訴人於1997**年轉職到**D**公司。於**2004**年上訴人與**B**公司訂下協議，一旦上訴人遞交辭職信給**D**公司和轉職到**B**公司，**B**公司會給與上訴人一筆款項。上訴人之後遞交了辭職信和轉職到**B**公司。上訴人反對該筆從**B**公司所取得的款項不應被徵收薪俸稅，因為該筆款項並非受僱入息，與服務**B**公司無關。再者該款項是賠償上訴人離開**D**公司的損失及該款項是上訴人在受僱於**B**公司前獲得。

裁決：

1. **委員會認為該筆款項的性質肯定是為了吸引上訴人接受** B **公司聘用。而且該筆款項的支付時間及其他規定，均列載於僱傭合約內，是** B **公司聘用上訴人的聘用條件的一部份。**

2. **任何人士轉換新工作都是以新的僱主的僱用條件取代舊的僱主的僱用條件，不存在賠償損失這課題。可能新僱主規模較小，因此風險大，因此須要提供一筆特別款項吸引有關僱員轉工。那麼，有關款項的性質便不是賠償，而是聘用條件及聘用代價之一部份，須要課繳薪俸稅 (參考** D36/92, IRBRD vol 7, 156)**。**

3. **委員會認為上訴人獲得該筆款項是按僱傭合約規定進行，依規定上訴人上任後，該筆款項便變為無須償還的款項，該款項便成為上訴人的入息，須在課稅年度內評稅 (參考**D83/00, IRBRD vol 15, 726; Clayton v Gothorp 47 TC 168)**。**

上訴駁回。

參考案例：

D19/92, IRBRD, vol 7, 156
D36/92, IRBRD, vol 7, 366
D3/94, IRBRD, vol 9, 69
D4/05, IRBRD, vol 20, 256
D83/00, IRBRD, vol 15, 726
Clayton v Gothorp 47 TC 168

袁慧敏會計師事務所之賴偉慶先生及袁慧敏女士代表出席聆訊
陳筱瑩及劉婉儀代表稅務局局長出席聆訊。

裁 決 書：

背景

1. A**先生(以下稱「上訴人」)反對稅務局向他作出的**2003/04**課稅年度補加薪俸稅評稅。上訴人聲稱他在**2003/04**課稅年度從**B**公司收取的**5,630,148**元款項不應課繳薪俸稅。**

2. **稅務局副局長在考慮過上訴人的反對後，於**2005**年**11**月**17**日發出評稅決定書，維持評稅主任的評稅。**

3. **上訴人反對稅務局副局長的決定，並就此提出上訴。上訴人的上訴理由如下：**

(a) **稅務局副局長在其評稅決定書內所　述的案情事實並不全面，並沒有考慮上訴人的稅務代表提供的某些重要案情事實；**

(b) **有關的款項並非上訴人的受僱入息，不應課繳薪俸稅。**

4. **在上訴聆訊時，上訴人選擇在宣誓後作供，並接受稅務局代表的盤問。**

案情事實

5. **在回應委員會的查詢時，上訴人的稅務代表向委員會澄清，與本上訴相關的基本事實，上訴人與稅務局局長並沒有重大爭議，雙方主要的分歧是在如何解**

讀有關的事實，而上訴人認為稅務局副局長所發出評稅決定書沒有充份反映上訴人的觀點。

6. **在考慮過雙方呈交的文件及聆聽過上訴人的證供後，委員會採納以下事實為本案案情事實。**

7. (a) **上訴人在**1988**年入職**C**公司，**C**公司是香港上市公司。**

(b) **上訴人在**1997**年轉職到**C**公司的附屬公司，**D**公司。**

8. **上訴人與**B**公司在**2004**年**1**月**10**日訂立僱傭合約，該合約規定如下：**

(a) **「為了獎勵(上訴人)服務本公司，能安心工作無後顧之憂，解決(上訴人)目前住所在**[E**銀行**]**之分期餘數欠款，其住所地址為**[**地址**F](**以下簡稱「**G**物業」**)**，業主登記為(上訴人及配偶)，**A/C No.[XXX-XXXXXX-XXX]。**(上訴人夫婦)每用上旬大約供分期約**66,600**元。」**

(b) **「僱主有特別安排如下：**
2004**年**2**月初(上訴人)一旦與舊僱主交辭職信，本公司便會安排在**2**月**10**日-**2**月**15**日之間一次性清還上述物業在**[E**銀行**]**之分期付款餘數，但(上訴人)若在**2004**年**3**月**1**日-**3**月**16**日之間仍未履行本合約條款到本公司上班，則本公司替(上訴人夫婦)清還之物業分期全數餘款則需(上訴人)歸還給本公司。」**

* (c) **「(上訴人)一旦上任後，則不論任何理由及任何情況，(該款項)，(上訴人)都不用歸還。」**

(***此條款是在**2004**年**1**月**20**日加入僱傭合約內**)

9. **相關事件發生的日期及次序如下：**

日期	**事項**
10-1-2004	**上訴人與**B**公司訂立僱傭合約**
20-1-2004	**僱傭合約加入上文第**8(c)**段**
9-2-2004	**上訴人向**D**公司遞交辭職信**
9-2-2004	**上訴人確認收妥**B**公司**5,630,148.89**元支票**
29-2-2004	**上訴人最後任職**D**公司的日期**
9-3-2004	**上訴人由此日起受僱於**B**公司**

本案的主要爭論點

10. **上訴人與稅務局局長主要的分歧是上訴人認為該筆從B公司取得的款項具備以下特質，因此不應被徵收薪俸稅：**

(a) **有關款項並非受僱入息，與服務B公司無關；**

(b) **該款項是賠償上訴人離開D公司的損失；及**

(c) **該款項是上訴人在受僱於B公司前獲得。**

有關的法例及案例

11. **《稅務條例》(香港法例第112章)(以下簡稱「稅例」)有以下規定：**

(a) **第8(1)條**

「除本條例另有規定外，每個人在每個課稅年度從以下來源所得而於香港產生或得自香港的入息，均須予以徵收薪俸稅 *–*

(a) ***任何有收益的職位或受僱工作……」***

(b) **第9(1)條**

「因任何職位或受僱工作而獲得的入息，包括 *–*

(a) ***不論是得自僱主或他人的任何工資、薪金、假期工資、費用、佣金、花紅、酬金、額外賞賜或津貼，…..」***

(c) **第68(4)條**

「證明上訴所針對的評稅額過多或不正確的舉證責任，須由上訴人承擔。」

12. (1) **在**D19/92, IRBRD, vol 7, 156**一案中，納稅人當他仍在英國一間財經公司擔任一高級職位期間，該英國公司的香港聯屬公司與他洽談到香港工作的條件，納稅人不準備轉職到香港公司除非香港公司同意給他一筆**50,000**美元(相等於**390,000**港元)的款項，此數目是他估計他與家眷從英國遷移到香港所須的支出。當該納稅人抵達香港後，香港公司立即給予納稅人**390,000**元。**

(2) **稅務上訴委員會裁定該筆**390,000**元的款項的性質是：**

(a) **香港僱主補助納稅人因遷移到香港而招致的部份支出；及**

(b) **吸引納稅人接納香港公司的聘用，因為沒有此筆款項，納稅人是不會到香港工作。**

相關判詞原文如下(第162**頁)：**

'… the lump sum payment was a payment made by the HK employer to recompense the Taxpayer at least in part for the removal expenses which he would incur in coming to Hong Kong, and that such payment was also an inducement without which the Taxpayer would not have come to work in Hong Kong.'

(3) **在決定了**390,000**元的性質後，稅務上訴委員會認為接著要決定的問題是該筆**390,000**元的款項是否須根據稅例第**8**條予以徵收薪俸稅，就此問題，委員會提出下列論點：**

(a) **決定是否須予以徵收薪俸稅的起點是稅例第**8**條。按稅例第**8(1)**條規定任何有收益的職位或受僱工作於香港產生或得至香港的入息，均須予以徵收薪俸稅。要決定的問題是有關款項是否納稅人因從受僱於其香港僱主所得的入息。**

相關判詞原文如下(第163**頁)：**

'The starting point in any salaries tax matter must be section 8 of the Inland Revenue Ordinance. Sub-section (1) states that "salaries tax shall … be charged … on every person in respect of his income … from … any office or employment of profit". These are the words which impose the charge of salaries tax. The question can then be simply stated. We must decide whether or not the lump sum payment was part of the income of the Taxpayer from his employment with the HK employer.'

(b) **稅例第**9**條的標題是「因受僱工作而獲得的入息的定義」。其實，第**9(1)**條的用字是「因任何職位或受僱工作而獲得的入息包括」**(income from any office or employment includes)**，因此第**9**條只是列出包括的項目，並非全部項目。**

相關判詞原文如下(第163**頁)：**

'*The heading to section 9 of the Inland Revenue Ordinance reads "definition of income from employment" but this heading is a little misleading because the opening sub-section (1) states that "income from any office or employment includes". Section 9 is not an exhaustive definition but merely a list of items which are included.*'

(c) **稅例第**8**及**9**條並沒有規限予以徵稅的入息須因過往或日後的服務而給予的，稅例第**8**條所指的入息是源自受僱工作。在此個案，獲取有關的款項是納稅人受僱香港僱主用條件的一部份，直接由於納稅人受僱於其香港僱主所取得，因此須課繳薪俸稅。**

相關判詞原文如下(第164**頁)：**

'*There is nothing in sections 8 or 9 of the Inland Revenue Ordinance which limit taxable payments to remuneration for services rendered or to be rendered. Section 8 relates to income from a source namely the employment. This lump sum payment was part and parcel of the employment of the Taxpayer with the HK employer. It arose directly from the employment which the HK employer offered to the Taxpayer and which the Taxpayer accepted. Accordingly it is assessable to salaries tax.*'

13. **在**D36/92, IRBRD, vol 7, 366**一案中，納稅人在**1989**年第二季當他仍在英國一間上市公司**X**公司工作期間，香港**Y**公司與他商討是否有意到香港工作，其後**Y**公司在聘用信中同意支付納稅人包括一筆**420,000**元的「特別花紅」**(special bonus)**。**

納稅人認為此筆420,000**元的款項不應予以徵收薪俸稅，因為該筆特別花紅是資本性款項**(capital payment)**，是賠償他因離開**X**公司而損失的福利。**

稅務上訴委員會裁定該筆420,000**元的款項是吸引納稅人接納聘用的款項，是額外賞賜**(perquisite)**，屬稅例第**9(1)(a)**條的範疇，因此須予以徵收薪俸稅。**

相關判詞原文如下(第389**至**390**頁)：**

'*Section 8(1) of the Ordinance imposes salaries tax on "income arising in or derived from Hong Kong" from "any office or employment of profit". Section 9(1) which the Board accepts is not exhaustive, provides that "income from any office or employment includes", and under sub-section (a), "perquisite".*

… the Board had occasion to consider a similar issue in D19/92, at the date of writing of this decision unreported. The distinction between the lump sum paid to the taxpayer in D19/92 and this present appeal is that the obligation to pay that lump sum was not included in the taxpayer's contract. In D19/92 the Board found as a fact that the contractual terms of the taxpayer's employment included an obligation upon his Hong Kong employer to pay that lump sum to him upon his taking up his employment and that, for the reasons stated, the payment could be an "allowance" or a "perquisite" as those words are used in section 9(1)(a) and, accordingly, was taxable under section 8(1). Many of the cases to which the Board's attention were drawn were referred to in that appeal.

A feature common to both cases is that the Taxpayer stated in evidence "without such a payment I would not have accepted their offer" and the Taxpayer stated that without Y Co's agreement to effect the payment of the $420,000 he would not have accepted Y Co's offer ….

The Board finds as a fact that the $420,000 was an inducement paid as a contractual obligation by Y Co to the Taxpayer in consideration of his taking up the position offered to him. Accordingly, it was a "perquisite", as that word is used in section 9(1)(a) of the Ordinance.

The Board also find as a fact that the perquisite was received by the Taxpayer in Hong Kong from his Hong Kong employer and that the source of that payment was the employment of the Taxpayer by Y Co in Hong Kong whereby it is income arising in or derived form Hong Kong from employment and is chargeable to salaries tax.'

14. **在**D3/94, IRBRD, vol 9, 69**一案的僱主同意分**12**期支付該納稅人一筆**162,000**元的款項, 納稅人認為該筆**162,000**元的款項不應予以徵收薪俸稅, 理由如下：**

(a) **有關款項屬資本性質**(capital in nature)**；及**

(b) **有關款項賠償因他離開前僱主而失去：**

(i) **在地區**A**優越的辦公室；及**

(ii) **以員工超優惠價購買名牌產品的權利。**

稅務上訴委員會裁定：

(a) **吸引接納聘用的款項是受僱入息。**

相關判詞原文如下(第72**頁第**7(1)**段)：**

'an inducement was taxable as an emolument from the employment'

(b) **稅務上訴委員會亦駁回納稅人賠償的論據。**

相關判詞原文如下(第73**頁第**8**段)：**

'Moving on the ground that the "inducement" sum of $162,000 was a "compensation" for the loss of certain rights and benefits to which the Taxpayer was entitled under the previous employment …, we take the view that it must fail.'

15. **在**D4/05, IRBRD, vol 20, 256**一案稅務上訴委員會不同意納稅人辯稱有關款項為賠償**(compensation)**，委員會解釋如下：**

(a) **在確定一筆款項是否賠償時，僱員一方須證明他曾損失或放棄了某些權益，而僱主一方在法律上有責任就此等損失或放棄了的權益作出賠償。**

(b) **假若僱主沒有要求僱員放棄任何權益，只是單方面給予僱員一筆款項，那筆款項便不是賠償。**

相關判詞原文如下(第17**段)：**

'The Taxpayer also tried to argue that the Sum was compensation for loss of employment. This cannot be correct. For a sum to be compensation, it must be shown that there is the loss or surrender or rights on the part of the Taxpayer and a legal liability on the part of Company B to pay compensation for loss of such rights. However, the Taxpayer's employment with Company B was determinable by any party upon giving the appropriate three months' written notice. When the notice period was proposed and accepted and paid to the Taxpayer, there was no breach of contract on the part of Company B and his employment continued. Furthermore, the Taxpayer admitted that the Sum was a unilateral offer from Company E without asking him to surrender any rights. We accept the Revenue's submissions that the Taxpayer had lost no rights and was not entitled to claim any damages from any party for the potential loss of office in Company B when the Sum was proposed or paid to him.'

16. **在**D83/00, IRBRD, vol 15, 726**一案稅務上訴委員會根據**Clayton v Gothorp 47 TC 168**一案裁定當僱主放棄追討有關貸款的一刻，有關款項便由貸款轉為入息。**

相關判詞原文如下(第734**頁)：**

‘ The sum was a loan till the point of waiver and the act of waiver converted the same into income. Such waiver was in consideration of the services rendered by the Taxpayer in those 1,410 days. We therefore agree with the Revenue that the sum of $811,981 was income of the Taxpayer.’

雙方的論據和案情分析

17. **上訴人在作供時詳細交代了他離開**D**公司及加入**B**公司主要原因是被**B**公司東主的誠意打動。但因為**B**公司是一間規模較小的新公司，前景不如**D**公司穩健，而且上訴人離開**D**公司，薪金及花紅等損失，可高至六百多萬港元。上訴人向**B**公司**H**先生提出他的顧慮。在得悉上訴人的顧慮後，**B**公司提出給予上訴人一筆款項，以便他一次過清還**G**物業的貸款餘額，使上訴人無後顧之憂。上訴人因此認為該筆款項是賠償他離開**D**公司的損失。**

18. **在回應稅務局代表的盤問時，上訴人聲稱他離開**D**公司的主要原因是**D**公司東主的第二代參與經營決策，使到他和東主之間的關係，不及以前密切。但上訴人承認**B**公司給予他的有關款項，是他加入**B**公司所考慮的一項因素。**

19. **在聆聽了上訴人的證供後，我們同意上訴人在作出離開**D**公司加入**B**公司的決定前，一定考慮過多項因素。但如果**B**公司沒有給予上訴人該筆五百多萬元的款項的話，上訴人肯定是不會接受**B**公司的招聘的。因此該筆款項的性質肯定是為了吸引上訴人接受**B**公司聘用。而且該筆款項的支付時間及其他規定，均列載於僱傭合約內，是**B**公司聘用上訴人的聘用條件的一部份。**

20. **上訴人辯稱該款項是**B**公司賠償他離開**D**公司的一切損失。但其實上訴人的所謂損失是不能再從**D**公司收取薪金、花紅等。任何人士轉換新工作都是以新的僱主的僱用條件取代舊的僱主的僱用條件，不存在賠償損失這課題。可能新僱主規模較小，因此風險大，因此須要提供一筆特別款項吸引有關僱員轉工。那麼，有關款項的性質便不是賠償，而是聘用條件及聘用代價之一部份。**

在D36/92**一案的納稅人亦提出有關款項是賠償的論點，但被上訴委員會駁回。**

21. **上訴人又辯稱有關款項是他在受僱於**B**公司之前獲得，因此不應予以徵收新俸稅。我們認為上訴人上述論點不成立，原因如下：**

(a) **上訴人是在與B公司訂立僱傭合約後才獲得該筆款項，而B公司支付該筆款項亦是按僱傭合約規定進行。**

(b) **僱傭合約規定，「一旦(上訴人)上任後則不論任何理由及任何情況」，上訴人不用歸還該款項。B公司於2004年2月9日支付該筆款項，上訴人於2004年3月9日上任，因此在2月9日至3月9日期間該筆款項可被視為預支款項。但在2004年3月9日，上訴人上任後，該筆款項便變為無須償還的款項，就正如D83/00及Clayton v Gothorp的裁決，在2004年3月9日此日，該款項便成為上訴人的入息，須在2003/04課稅年度內評稅。**

案情總結及裁決

22. **在考慮過整宗案情及雙方陳詞後，我們認為上訴人從B公司收取的有關款項是B公司聘用上訴人的聘用條件及聘用代價的一部份，須要課繳薪俸稅，我們因此駁回上訴並維持稅務局的評稅。**